

MEMORANDUM FOR Mr. Larry Chelko, Director, USACIL

SUBJECT: Notice of Proposed 45-day Suspension - Donald Mikko

This is my response to the Notice of Proposed 45-day Suspension dated 9 May 2011 and served on me by Mr. Richard E. Tontarski on 9 May 2011 (the "Notice"). The Notice is factually deficient, obviously retaliatory and malicious in intent. Please consider the following:

1. The most obvious discrepancy and evidence of the retaliatory nature of Mr. Tontarski's action is the time frame. Some of the events relating to Notice took place almost three years ago and all of the facts and circumstances were either known or readily available to Mr. Tontarski at that time, but neither he, nor you, saw reason to take any action. There were no secret negotiations to be discovered or investigated, until after I stepped forward in support of the discrimination complaint of Mr. Albert Bell.
2. There is a factual error in paragraph 2.c. Mr. Tontarski states that, "[t]he applicants for the position were to be evaluated by you and Mr. Doyne . . ." Mr. Tontarski omitted the name of Mr. Miller. This is an obvious misrepresentation most likely deliberate because Mr. Tontarski knows that Mr. Miller's evaluation of the candidates was substantially consistent with mine.
3. In paragraph 2.d. of the Notice Mr. Tontarski materially misrepresented the facts by omission when he stated, "[i]n July 2008, you ranked Mr. Black as the 5<sup>th</sup> rated applicant over numerous others." The conveniently omitted fact is that I initially rated Mr. Black as 21<sup>st</sup> on my list and a copy of my original ranking is included in the AR 15-6, but was apparently ignored by Tontarski. As the interview process progressed, Mr. Black moved up the list through interview evaluation and attrition. Mr. Miller's conclusions regarding Mr. Black during the interview process are reflective of mine, but apparently no one has asked Mr. Miller, and as I noted above Mr. Tontarski omitted Mr. Miller from the Notice.
4. In paragraph 2.d. of the Notice Mr. Tontarski again materially misrepresented the facts when he stated, "CPOC determined that most of the recommended applicants did not qualify to be considered for firearms examiner positions." Since the positions were direct hire, CPOC was not involved in the initial hiring process. Later in the process CPOC determined that Mr. Bell and Mr. Cox were the only two eligible applicants for firearms examiner students due to the source of funding. It is correct that the other applicants had to be hired as technician, but Mr. Black was never referred to CPOC. Actually, these comments by Mr. Tontarski are nonsensical.

5. Mr Tontarski's comments in paragraph 2.e. are nothing more than a malicious attack unsupported by any facts. I am certain you know that Mr. Black was later offered employment by at least one other manager without any input from me. If, as Mr. Tontarski says, my "recommendation was so egregious and such a departure from the standards expected of a manager . . .," why has no one looked at these other managers, or why is Mr. Tontarski not painting them with the same brush?

6. Mr. Tontarski's comments in paragraph 2.f. are merely restatements of his earlier self-serving conclusory statements and prove nothing.

7. In paragraph 2.g. of the Notice Mr. Tontarski materially misrepresented the facts in that he omitted that part of the discussion regarding the need to immediately fill the position and not to wait. The reason for this was that the position had, on two previous occasions, been held open for several months for applicants who ultimately declined the position. Mr. Tontarski expressly directed that we not repeat that process.

8. In paragraph 2.h. of the Notice Mr. Tontarski materially misrepresented the facts in that it was understood that the non-degree announcement was due to the historical difficulty in finding applicants with a degree and experience. If Mr. Tontarski never intended to hire a non-degree applicant, he caused the problem by allowing the misleading announcement to be published. No one disputes that we wanted the best qualified applicant, but there were several variables in making that selection, one of which was immediate availability as noted above. Another, material fact omitted by Mr. Tontarski is that during the selection process a CRA was in effect and it was unknown when it would be lifted, and Mr. Bell was the only applicant eligible for immediate continual employment.

9. Totally omitted from the Notice is any discussion of the need to immediately employ the new examiner, an issue that Mr. Tontarski repeatedly emphasized in earlier statements. For several reasons, that is except for Mr. Tontarski's questionable intervention in Mr. Bell's training program and subsequent deployment with the RBOC, Mr. Bell could have been fully qualified within a reasonable time after his selection, and his utilization at the technician level could have been immediate. This is particularly relevant because of the loss of Mr. Cayton and the removal of his position from the Firearms Branch by

Mr. Tontarski.<sup>1</sup> This created an immediate use for a technician while the need for a fully qualified examiner was not pressing.

10. In paragraph 2.j. of the Notice Mr. Tontarski materially misrepresented the facts in that Mr. Bell has shown himself to be the most outstanding of those hired for firearms and toolmark positions within the RBOC. It is not necessary to rely on my judgment as both Colonel Rowe and Mr. Doyme have given sworn statements to that effect. Mr. Bell is still in a training status due to changes in the training program instigated by Mr. Tontarski and due to his deployment to Afghanistan.

11. In paragraph 2.k. of the Notice Mr. Tontarski jumps to conclusions that are unsupported by facts. He did not participate in the interview process and is ignorant of the reasons why many of the candidates were not considered or ranked lower. Any interview process is subjective to a degree and Mr. Tontarski was not there.

12. Also, totally missing from the Notice is any discussion of the fact that Mr. Parker was a part of the selection process involving Mr. Bell and that Mr. Parker came to similar conclusions regarding Mr. Bell. Mr. Tontarski has claimed that he does not have all the selection board documentation, in particular Mr. Parker's score sheets. This directly contradicts sworn testimony at the Fact Finding Hearing in the Bell EEO case. In a related issue, in the AR 15-6 investigation Mr. Tontarski questioned the process the Selection Board used to "score the candidates." [Observations and Questions, Tontarski, 3 August 2010] Score Sheets provided by Mr. Larry Chelko were in fact used and were given to Mr. Tontarski by Mr. Miller. [See Rating Panel Assessment of Candidates Form, AR 15-6]

13. Charge II as stated in paragraph 4 is both factually and legally defective. All of the Specifications are actually defective for the reasons stated in paragraph 1-12. Specifications 1 & 2 are legally defective because I was not the Selecting Officer. I was only directed to carry out the rating process, a responsibility that was abrogated by Mr. Tontarski. Only Mr. Tontarski had the authority to grant a preference, and his failure to conduct the full selection process is not legal grounds to ascribe his legal responsibilities to me. Specification 3 is legally defective because in October 2009 Mr. Tontarski used his authority to usurp, albeit probably illegally, the responsibilities to which I had been officially appointed before my actions had any effect.

---

<sup>1</sup> While it is apparent from recent events that discrimination is not a high level concern at USACIL, it is worthy to note that Mr. Cayton at least partly based his resignation on alleged age discrimination by Mr. Tontarski.

14. The racial and retaliatory overtones in this action are also evidenced by the limited focus on Mr. Black. A similar set of circumstances were involved in the selection of Mr. Bailey who I initially rated as 18<sup>th</sup>. At the end of the selection process Mr. Bailey, just as Mr. Black, had moved up on the list to the point where he should have been considered for one of the vacancies. But, Mr. Tontarski absolutely refused to consider Mr. Bailey, who is black. But now that concern has been raised regarding just how those 2008 hiring actions were conducted, why is there no interest in looking at the treatment of Mr. Bailey. The answer is obvious - discrimination involving Mr. Tontarski once again raises its ugly head.

15. Mr. Tontarski has already criticized me for the same actions on at least two previous occasions, such as my 2009 and 2010 evaluations. In Objective for of my 2009 evaluation Tontarski stated that I did not comply with his verbal instructions to hire qualified RBOC examiners and this required his frequent intervention/redirection because I did not apply the candidate standards that he identified. He was most certainly referring to the selections of Messrs Bailey and Black. In 2010, he rated me with a #4 which is "fair" but below average (3 rating) and stated that improvement was needed in carrying out the hiring process and that attention to detail was needed to ensure applicants meet selective placement factors before progressing in the selection process and that I didn't reflect a proper evaluation of the candidates and that I did not following the merit hiring standards per his guidance. In both instances, he claimed that these merit hiring policies were a form of trust and teamwork and he claims that this is why he addressed the issues. When I questioned him about why he criticized me in 2009 and then again in 2010 on the same issue, he stated that the hiring actions had a significant impact on the lab and that they were not related in the evaluations because in 2010, he was writing it up under trust issues and teamwork. It is obvious that he is frustrated in his inability to generate new attacks on me and must keep going back to the same worn out issues of years ago.

The proposed action against me is so obviously retaliatory for my participation in equal employment discrimination claims that your support of this action by Mr. Tontarski makes you a willing party to his conduct. I truly hope you will reconsider this action.

DONALD M. MIKKO  
Chief, Firearms Branch